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# Men, whites ‘need not apply’

By: Bernadette Starzee May 18, 2016 Comments Offon Men, whites ‘need not apply’

Producers of the Broadway hit “Hamilton” came under fire recently for advertising for “nonwhite” performers. The hip-hop musical about America’s founding fathers features Latino and African-American performers in most of the prominent roles.

While it’s common practice to state the race, gender and age range of the character that the actor will play, in most cases employers cannot hire people based on their race, gender, age or any other protected characteristic.

In response to widespread criticism, including from the Actors’ Equity Association, which said auditions should be open to everyone, producers changed the wording of their casting call, making it clear that people of all ethnicities were welcome to audition. But they also stated, “It is essential to the storytelling of ‘Hamilton’ that the principal roles, which were written for nonwhite characters (excepting King George), be performed by nonwhite actors. This adheres to the accepted practice that certain characteristics in certain roles constitute a ‘bona fide occupational qualification’ that is legal.”

But whether this does, in fact, constitute a bona fide occupational qualification, or BFOQ, is questionable. Title VII of the Civil Rights Act allows employers to make hiring decisions on the basis of “religion, sex or national origin” [race is not mentioned] “in those certain instances where religion, sex or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.”

A BFOQ defense would not apply when an employer refuses to hire someone from a certain protected class based on the preferences of co-workers, clients or customers.

“If everyone at the workplace says they don’t want to work with a woman, or they only want to work with white people, or customers say that, that’s not a defense,” said attorney Mark Reinharz, who is a member of Bond, Schoeneck & King in Garden City. “Years ago people didn’t want to work with someone with HIV. There are protections in place against discrimination.”

While there is not a lot of case law on what constitutes a BFOQ, Jonathan Trafimow, partner and chair of the employment practice group at Moritt Hock & Hamroff in Garden City, said the issue tends to come up most often with regard to gender.

“Let’s say you were running a business, and your customers said they don’t want a woman handling their account,” Trafimow said. “It’s unlawful for an employer to cater to that desire by not hiring women.”

Reinharz pointed to a 1971 case against Pan American, which refused to hire male flight attendants. The question was whether being female was “reasonably necessary” to the normal operation of the job.

“In those days, it was mostly men traveling for business, and Pan Am said their customers preferred being served by pretty stewardesses,” said Reinharz. “The court said no, this had nothing to do with the essence of the job – which was providing assistance to passengers, something that both men and women could do.”

However, customer preference has in some cases constituted a BFOQ when it relates to privacy.

“Let’s assume you have an elderly woman who needs someone to bathe her and tend to her personal needs,” Reinharz said. “In such cases, the court will recognize there are significant privacy concerns.”

Reinharz pointed to a case in which a male ob/gyn physician brought a case against Beth Israel Hospital, claiming he was discriminated against based on his gender because the hospital accommodated female patients who requested female doctors. The court found in favor of the hospital, stating that “female patients may have a legitimate privacy interest in seeking to have female doctors perform their gynecological examinations.”

However, as Trafimow noted, the court rejected a hotel’s argument that because its customers preferred a female massage therapist over a male, that this constituted a BFOQ.

“It was deemed to be catering to preferences,” Trafimow said. “BFOQs were meant to be extremely narrowly interpreted, but how narrow is a question. There are certain circumstances where it can apply, such as when people are providing a personal and intimate type of medical care to women. But employers should do their homework to see if they fit with cases analogous to their situation – are they going to be closer to the massage therapy case? You better have your facts well-thought-through; it’s a narrow defense.”

BFOQs with respect to gender will likely become more difficult to establish with the emergence of LGBT issues in the workplace, said Ana Shields, a principal in the Melville office of Jackson Lewis.

With regard to gender, federal regulations state a BFOQ exception can also be made for the “purpose of authenticity or genuineness as an actor or actress.” But as Shields noted, “If you have a transgender individual applying for a female acting role, who is going to say it’s not going to be authentic?”

In the case of the Broadway smash, “we’ve come a long way with stage makeup,” Shields said. “I’m not sure that ‘Hamilton’ would be able to make an argument based on authenticity.”

Further, BFOQ defenses apply only to gender, national origin and religion, not to race, pointed out Jonathan Farrell, partner and co-chair of the labor and employment practice group of Meltzer, Lippe, Goldstein & Breitstone in Mineola.